No. 72-1719

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM J. BENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. A3-A5) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1973. Petitioner's timely motion for rehearing was denied on May 11, 1973. The petition for a writ of certiorari was filed on June 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a former serviceman's challenge to the legality of two administrative reductions in rank, one effective January 13, 1954, and one effective March 1, 1954, is barred by laches.

REGULATIONS INVOLVED

Department of the Army Special Regulation 615-25-55, May 2, 1951, as amended by Change 2, October 6, 1952, and Change 3, November 10, 1953, provides in part as follows:

ENLISTED PERSONNEL

REDUCTIONS

Section I

GENERAL

1. *General.*—The action to effect a reduction in grade will provide for reduction from the grade in which serving to an appropriate lower grade.

* * * * *

11. *When effective.*—Reductions of enlisted personnel will be effective—

a. When by sentence of courts martial.—* * *.

b. When by operation of law.—* * *.

c. In all other cases.—On the date upon which notice of reduction is received by the enlisted person, or, if absent for his own convenience or through his own fault, upon the date the notice of reduction is received at his proper station.

12. *Orders.*—Reductions of enlisted personnel will be announced in orders of the headquarters of the reduction authority. Required entries will be made in the service record and other pertinent personnel records. Reduction orders and service record entries will cite the specific paragraph of the regulations under which authority the reduction was accomplished.

13. *Revocation or recission of orders.*—Orders announcing the reduction of enlisted personnel issued by authority competent to effect such reduction will not be revoked or rescinded except by the issuing authority to correct an administrative error or by order of the Secretary of the Army.

Section II

REDUCTIONS FOR INEFFICIENCY

* * * * *

15. *Noncommissioned officers to next lower grade.*—Noncommissioned officers in grade E-4 may be reduced one grade by company or comparable commanders, and noncommissioned officers in grade E-7, E-6, and E-5 may be reduced one grade by regimental, separate battalion, or comparable commanders when for reason of inefficiency sufficient cause exists to warrant such action in the best interests of the service.

STATEMENT

The undisputed facts, as they appear in the Plaintiff's Brief in Support of Motion for Summary Judgment in the Court of Claims are as follows:[1]

Petitioner enlisted in the Navy in 1943. Upon expiration of his enlistment in 1946, he reenlisted in the Army, from which he was honorably discharged on December 6, 1957. On the date of his Army discharge, he reenlisted in the United States Air Force and served therein until retired for longevity on July 31, 1966.

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[1]A copy of Plaintiff's Brief in Support of Motion for Summary Judgment is being lodged with the Clerk of this Court.

On January 13, 1954, by an order dated January 14, 1954, petitioner, then serving in the Army, was administratively reduced in grade from Sergeant First Class (Temporary) E-6 to Sergeant First Class (Temporary) E-5, under paragraph 15 of Army Special Regulation 615-25-55. On March 1, 1954, by an order dated March 15, 1954, he was again reduced in grade from Sergeant (Temporary) E-5 to his permanent grade of Corporal E-4, by authority of the same Special Regulation.

At the time of both reductions in grade, petitioner was serving in Korea. He claims that he was not notified of these reductions while abroad and that he continued to serve for several months without diminution in rank or pay. He alleges that it was not until after he was reassigned to Fort Jackson in the continental United States that he noticed his pay check was smaller. When he inquired about it, he was told that he had been "reduced." Upon further inquiry, he claims, he was referred to "Inspector General's" office at Fort Jackson where he was informed that he had no right to appeal.

Some 10 years later, on January 14, 1965, according to petitioner, an Air Force officer informed him of his right to appeal. This officer requested petitioner's records from the Army Records Center. When, in response to this request, the officer was informed that the Special Orders concerning petitioner's reductions were not on file, the officer allegedly informed petitioner that he was without further recourse.

On August 19, 1969, three years after his retirement, petitioner applied to the Army Board for Correction of Military Records for the restoration of his grade and pay together with the promotions to which he claimed he was entitled. This application was denied in February 1970, and a request for further consideration was denied in March 1971.

In July 1971, petitioner filed a petition in the United States Court of Claims, seeking annulment of his administrative reduction, restoration of rank, the promotions to which he would have been entitled, pay for the period between the reduction and his retirement at the correct rank, and an increase in his retirement allowance to the amount which he would have received had he not been reduced in rank. The court denied petitioner's motion and granted the government's cross-motion for summary judgment on the ground that the claim was barred by laches (Pet. App. A3-A5).[2]

ARGUMENT

Petitioner's sole contention is that laches cannot bar his claim for back pay, because the orders reducing his rank were made effective retroactively and without notice or opportunity to be heard and were therefore "void for lack of power to make" them (Pet. 14). He cites many cases for the proposition that a void *judgment* may be collaterally attacked at any time (Pet. 16-36). But this is not a collateral attack on a judgment of a court. It is an effort to overturn an administrative order some 18 years after that order was effective. This Court has held that one who has been removed from a government office by the proper authority, but who alleges he was given no notice or opportunity to be heard, cannot recover the pay to which he claims he was entitled if he had not been diligent in asserting his rights. See *Nicholas* v. *United States,*

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[2] The Court of Claims previously denied the government's motion to dismiss, which had been based on the 6-year statute of limitations of 28 U.S.C. 2501. The court held that the statute had been tolled by the Soldiers' and Sailors' Relief Act of 1940, as amended, 50 U.S.C. App. 525.

257 U.S. 71, in which a claim filed three years after removal was held barred by laches. See also *Arant* v. *Lane*, 249 U.S. 367, in which a 20-month delay amounted to laches.

These decisions control this case. There is no authority for petitioner's view that a different rule should apply whenever the claimant argues that the order of removal or reduction was "void" rather than simply "unlawful." Regardless of the label used, the claimant may not sit on his rights. The Court of Claims properly determined that in the circumstances of this case 18 years was too long to wait. There is no reason for further review of that determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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